LIBRARY
SUPREME COURT, U.S.

No. 495

Office-Supreme Court, U.S.
FILED
SEP 14 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Respondent.

On Appeal from the Supreme Court of the State of Wisconsin

JURISDICTIONAL STATEMENT

EDWARD D. CLEVELAND
2100 Marine Plaza
Milwaukee, Wisconsin 53202
Attorney for Anthony Mutter, Appellant

WHYTE, HIRSCHBOECK, MINAHAN,
HARDING & HARLAND
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA review 5-5581

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	3
Statement of the Case	4
The Question is Substantial	7
Conclusion	10
Appendix A	App. 1
Appendix B	App. 8
Appendix C	App. 11
Appendix D	App. 17

CITATIONS

CASES:

Dodge v. Board of Education, 302 U.S. 74	8
Gomillion v. Lightfoot, 364 U.S. 339	8, 9
Graham v. Folsom, 200 U.S. 248	9
Hunter v. Pittsburgh, 207 U.S. 161	7, 8
James Hall v. State of Wisconsin, 103 U.S. 5	8
State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95	8

PAGE

STATUTES:

Wisconsin Statutes, 1961:

Section 26.06(1) 5
Section 26.06(2) 2, 5
Section 28.12 ..... 2, 3, 4, 6
Section 77.03 ..... 3, 4, 6
Section 77.10(2)(a) 2, 3, 4, 5, 6
Chapter 77 ..... 2, 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Respondent.

On Appeal from the Supreme Court of the State of Wisconsin

JURISDICTIONAL STATEMENT

OPINION BELOW

The decision of the Wisconsin Supreme Court has been reported in 23 Wis. (2d) 407, 127 N.W. (2d) 15, and is appended hereto (App. A, *infra*, pp. 1-7).

JURISDICTION

The appellant was charged with the offense, defined in §26.06(2) of the Wisconsin Statutes, of removing seizure notices of the Wisconsin State Conservation Department from decked pulpwood cut on lands entered as Forest Crop Lands under Chapter 77, Wisconsin Statutes. Appellant was convicted by the County Court for Vilas County, Wisconsin. Judgment of conviction was affirmed by the Vilas County Circuit Court, and again affirmed by the Wisconsin Supreme Court by decision entered March 31, 1964. Appellant's motion for rehearing was denied on June 2, 1964. Notice of appeal was filed in the Circuit Court of Vilas County, Wisconsin, on August 27, 1964.

In affirming appellant's conviction of unlawfully removing seizure notices, the Wisconsin Supreme Court determined that the pulpwood on which said seizure notices had been placed had been cut from county-owned lands still entered under the Wisconsin Forest Crop Law. In support of this determination, the Wisconsin Supreme Court ruled that the enactment of §28.12, Wis. Stats., and the 1959 amendment of §77.10(2)(a), Wis. Stats., were not an unconstitutional impairment of the obligations of contracts prohibited by Article I, Section 10 of the United States Constitution. In so doing, the Wisconsin court held that a statutory contract had been created between the State and Vilas County by virtue of the county's entry of its lands under the terms of Chapter 77, Wis. Stats., but that §28.12, Wis. Stats., and the 1959 amendment of §77.10(2)(a), Wis. Stats., subsequently deprived the County of the withdrawal rights provided by such statutory contract.

§§77.03, 77.10(2)(a) and 28:12, Wisconsin Statutes, 1961, are appended hereto (App. D, *infra*, pp. 17-19).

The jurisdiction of this Court to review by direct appeal from the Wisconsin Supreme Court is conferred by 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether a state which has chosen to deal with its own political subdivisions on a contractual basis may unilaterally alter or abrogate the terms of an express statutory contract with such a subdivision by subsequent legislation, where such action supports the criminal conviction of a private citizen.

STATEMENT OF THE CASE

From time to time during the years 1933 to 1945, Vilas County, Wisconsin, as an owner of forest lands, entered the same under the Forest Crop Law, Chap. 77, Wisconsin Statutes. Entry was made pursuant to §77.03, Wis. Stats., which provided that such entry

> "shall constitute a *contract between the state and the owner* . . . whereby the state *as an inducement to owners* and prospective purchasers of forest crop lands to come under this chapter agrees that . . . *no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands*, except as the conservation commission and the owner may expressly agree in writing." (Emphasis supplied)

At all times between 1933 and 1945, said Chap. 77, Wisconsin Statutes, and particularly §77.10(2)(a) thereof, permitted a county to withdraw its lands by simply filing a declaration of withdrawal, no payment by the county to the state being required to render such withdrawal effective.

In 1947, subsequent to Vilas County's entry of the lands in question, §28.12 of the Wisconsin Statutes was first enacted, prescribing procedures which should be followed by counties withdrawing forest crop lands for purposes of sale, and requiring certain payments by the county to the state when the sale was to be made to any purchaser other than the state or any local unit of government.

In 1959, §77.10(2)(a) of the Wisconsin Statutes was amended by addition of the following sentence:

> "A county may withdraw county-owned lands from this chapter under s. 28.12."

In 1961, Vilas County filed its declaration of withdrawal (R. 10) of all county-owned lands, which had been entered under the Forest Crop Law prior to 1947. Appellant, as County Forester for Vilas County, informed the Wisconsin Conservation Commission by letter (R. 11), that such lands were not being withdrawn for purposes of sale.

Thereafter, Vilas County entered into timber sale agreements with private persons, who cut timber on said county-owned lands pursuant to such agreements. The Wisconsin Conservation Department then placed seizure notices on such cut timber, pursuant to its purported authority, under §26.06(1) of the Wisconsin Statutes, to seize timber cut from "forest crop lands entered under the provisions of Chapter 77." Appellant removed eight of such seizure notices and was charged with violating §26.06(2) of the Wisconsin Statutes, which makes it unlawful for any person to remove the seizure notices authorized by §26.06(1).

The essential facts, including appellant's removal of the seizure notices, were stipulated (R. 3) to the County Court for Vilas County, Wisconsin, and the case was tried by that court upon such stipulated facts and appellant's motion to dismiss. The motion to dismiss (R. 2) contended that there was no violation of law in removing such seizure notices, since they had been placed on timber cut from lands which Vilas County had previously withdrawn from the Forest Crop Law by procedures guaranteed to be effective in the county's statutory contract with the state, and the Wisconsin Conservation Department therefore had no

authority to seize the cut timber. The county court entered judgment convicting appellant of the offense charged, on the ground that the county's previously existing right of withdrawal had been abrogated by subsequent enactment of §28.12 and the 1959 amendment of §77.10(2)(a), Wis. Stats., so that the county's attempted withdrawal was ineffective, and the lands therefore were still entered under the Forest Crop Law when the timber was cut. The Memorandum Opinion of the County Court is appended hereto (App. B, *infra*, pp. 8-10).

Appellant appealed to the Circuit Court for Vilas County. It was stipulated (R. 16) that the circuit court should decide the case on the record and motion to dismiss made in the county court. The circuit court affirmed the judgment of conviction, again deciding that application of the Wisconsin Statutes to deprive the county of its previously existing right of withdrawal was valid, notwithstanding provisions of the Wisconsin and United States constitutions prohibiting legislative impairment of the obligations of contracts. The Memorandum Opinion of the Circuit Court, dated June 7, 1963, is appended hereto (App. C, *infra*, pp. 11-16).

Appellant then appealed to the Wisconsin Supreme Court which, by its decision entered March 31, 1964, again upheld the conviction. While recognizing that §77.03, Wis. Stats., had expressly given Vilas County a right, under statutory contract with the state itself, to effect a withdrawal of its lands by the procedures which the county actually followed, the Wisconsin Supreme Court held that the Wisconsin legislature had effectively deprived the county of its pre-existing right through statutory amendment. The court said (23 Wis. (2d) 412; App. A, *infra*, pp. 4-5):

"The defendant also claims that the county had a contractual right under the pre-existing statutes of the Forest Crop Law, which right was constitutionally inviolable. We recognize that the language of sec. 77.03, Stats., on its face appears to support the defendant's contention. . . . [quotation of statute omitted]

"Notwithstanding the above-quoted statute, we are obliged to conclude that the legislature was not legally bound by it. The law is clear in Wisconsin that the legislature, in its relationship with municipal or quasi-municipal corporations of the state, is not obliged to heed prior legislative expressions."

This decision was based on the ground that the county, as a creature of the state, enjoys no constitutional protection against state legislation impairing the obligations of contracts, under the rule of *Hunter* v. *Pittsburgh* (1907), 207 U.S. 161, 178, 179, 28 Sup. Ct. 40, 52 L. Ed. 151, and related cases. Thus the Wisconsin Supreme Court stated (23 Wis. (2d) 414; App. A, *infra*, p. 7):

"Since the lands from which the seized logs were cut had never validly been withdrawn from entry under the Forest Crop Law, we conclude that the defendant was properly convicted of a violation of sec. 26.06(2), Stats., for his unlawful removal of the seizure notices."

THE QUESTION IS SUBSTANTIAL

This appeal presents an issue which has never been decided by this Court or, so far as we can determine, by any court in the land except in the instant case. The Wisconsin Supreme Court, and the circuit and county courts of Vilas County, conceived the issue to be the same as that decided in *Hunter* v. *Pittsburgh*, *supra*, and related cases. But the issue in such cases is only similar to, not the same as, the

issue in this case. The distinction was clearly recognized in *Gomillion* v. *Lightfoot* (1960), 364 U.S. 339, 81 Sup. Ct. 125, 128, which noted that *Hunter* v. *Pittsburgh* involved no express or implied contract between the state and its political subdivision, and that it is authority "only for the principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities *solely as a result of their relationship.*" (Emphasis supplied) In the instant case, on the other hand, we do have an express statutory contract between the state and such subordinate governmental entity. And we have a conviction of a private citizen which rests upon the impairment of the obligations of such statutory contract by subsequent state legislation.

The issue here is also similar to, though not precisely the same as the issue decided by this Court in such cases as *James Hall* v. *State of Wisconsin* (1880), 103 U.S. 5, 26 L. Ed. 302, *Dodge* v. *Board of Education* (1937), 302 U.S. 74, 58 Sup. Ct. 98, 82 L. Ed. 57, and *State of Indiana ex rel. Anderson* v. *Brand* (1938), 303 U.S. 95, 58 Sup. Ct. 443, 82 L.Ed. 685. In such cases, this Court was not faced with the question whether a subordinate governmental entity enjoyed constitutional protection against impairment of its contracts by the state, but whether public employees should be so protected. In each case this Court distinguished between mere privileges of employment, granted by statute and revocable at the state's will by subsequent legislation, and statutory *contract* rights in the terms of employment, which this Court held could not be so impaired.

The issue here has been foreshadowed, though not decided, by dicta in *Gomillion* v. *Lightfoot, supra,* and

Graham v. *Folsom* (1906), 200 U.S. 248, 26 Sup. Ct. 245, 50 L. Ed. 464. As Justice Frankfurter said in *Gomillion* (81 Sup. Ct. 128-129):

> "... The Hunter opinion itself intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by the municipal corporations, 207 U.S. at 171-181 ...."
>
> "This line of authority conclusively shows that the *Court has never acknowledged* that the States have power to do as they will with municipal corporations regardless of consequences, *Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution* ...."
>
> "The observation in *Graham* v. *Folsom*, 200 U.S. 258, 26 S. Ct. 245, 50 L. Ed. 464, becomes relevant:
>
> > '.... such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States *which forbids a state from passing any law impairing the obligation of contracts*' ...." (Emphasis supplied)

This appeal presents this Court for the first time with the opportunity to eliminate the *tertium quid*, namely, whether a state may constitutionally abrogate its own statutory contract with a subordinate governmental entity regardless of the consequences this may have upon the rights of private citizens. We submit that this question is vitally important to the clear definition of state responsibility and power.

CONCLUSION.

The appeal presents a substantial question of public importance within the jurisdiction of this Court. We request that it be scheduled for briefs and oral argument.

Respectfully submitted,

EDWARD D. CLEVELAND,
Attorney for Anthony Mutter,
Appellant

WHYTE, HIRSCHBOECK, MINAHAN,
HARDING & HARLAND
Of Counsel

September , 1964.

APPENDIX A

Decision of Wisconsin Supreme Court dated March 31, 1964 as Reported in 23 Wis. (2d) 407

APPEAL from an order of the circuit court for Vilas County:

BRUCE F. BEILFUSS, Circuit Judge of the Seventeenth circuit, Presiding. AFFIRMED.

The defendant appeals from an order of the circuit court for Vilas county which denied the motion of the defendant to dismiss the criminal complaint, such order also having the effect of affirming a judgment of the county court which convicted the defendant for violation of sec. 26.06(2), Stats. A criminal complaint had been made on January 4, 1962, by the district attorney of Vilas county against the defendant, Anthony Mutter. The complaint charged the defendant with unlawfully removing eight seizure notices of the state conservation commission, a violation of sec. 26.06(2).

The record includes a stipulation of facts entered into for the purpose of the trial in the county court. According to the stipulation, Vilas county, in its proprietary capacity as a body corporate and political subdivision of the state, was the owner of certain lands. Between certain specified dates from 1933 to 1945, such lands were formally entered as forest crop lands pursuant to the Forest Crop Law, ch. 77, Stats.

The defendant, Anthony Mutter, was appointed as the Vilas county forester with the approval of the county board on November 13, 1957. Pursuant to a Vilas county order of November 10, 1953, the Vilas county forester has the general duty to administer all county lands entered under the Forest Crop Law.

On August 3, 1961, the Vilas county board sent a declaration of withdrawal of said lands as forest crop lands to the Wisconsin conservation commission. On September 21, 1961, Mutter, as county forester, sent a letter to the director of the Wisconsin conservation department. The purpose of the letter was to reaffirm the Vilas county declaration of withdrawal of all Vilas county owned lands from under the Forest Crop Law effective September 30, 1961. The letter stated that Vilas county was not withdrawing these lands for purposes of sale and that as a result sec. 28.12, Stats., did not apply.

On October 5 and 12, 1961, pursuant to authority of the Vilas county forestry and land committee, Mutter caused to be published in the Vilas County News-Review an advertisement of timber sales with respect to the lands described in the stipulation. Mutter entered into timber-sale agreements on behalf of the county with four named persons, such contracts being entered into on October 2, 1961, and on November 18, 1961. Cutting and removal operations were commenced in furtherance of timber-sale agreements on all of the lands described.

After the start of cutting and removal of the timber, between December 19 and 21, 1961, the Wisconsin conservation commission caused tags to be attached to decked pulpwood so cut under said agreements on the land described. On December 24, 1961, Mutter removed eight of such tags from decked pulpwood on three of the parcels of land described in the stipulation. It is this act of removing the eight tags that constituted the offense for which the defendant stands convicted.

Mutter gave an affidavit dated May 17, 1962, which was also made part of the record when the case was before the Vilas county court. The affidavit reiterates the general nature of the duties of the defendant. An additional stipu-

lation was entered into by Mutter's attorney and the Vilas county district attorney on October 8, 1962, which provided that on the appeal to the circuit court the said circuit court could utilize the record and stipulation from the county court. It was further stipulated that the circuit court could decide the issues on the record, papers, and proceedings filed in the county court.

The sentence, if any, imposed in the county court is not given, but sec. 26.06(2), Stats., provides that the punishment for a violation shall be as provided in sec. 26.15. The latter section provides that a violation shall constitute a misdemeanor and that punishment shall be by a fine of not less than $10 or more than $50, or by imprisonment in the county jail for not less than ten days or more than thirty days, or by both fine and imprisonment.

In the order appealed from, dated September 23, 1963, it was noted that in the circuit court the case was decided on the record which was made in the county court with no additional hearing in the circuit court.

For the appellant there were briefs by *Edward D. Cleveland*, attorney, and *Whyte, Hirschboeck, Minahan, Harding & Harland* of counsel, all of Milwaukee, and oral argument by *Mr. Cleveland*.

For the respondent the cause was argued by *Roy G. Tulane*, assistant attorney general, with whom on the brief was *George Thompson*, attorney general.

Gordon, J. This case presents a difficult problem in the construction of statutory law and brings to mind the comment attributed to Lord Coke:

> "If it be common law, I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed if I answered you immediately."
>
> —Woolryen, Life of Coke, page 197

As the defendant analyzes the statutory history of the Forest Crop Law, he draws the conclusion that Vilas county was legally entitled to withdraw its lands from the state program. He bases this conclusion on the provisions of ch. 77, Stats., and particularly sec. 77.03, which the defendant urges was the controlling section at the time that Vilas county entered its lands. Such entry occurred before the enactment of ch. 195, Laws of 1959, and there is not much doubt that prior thereto a county could withdraw its forest crop lands for purposes other than sale without reimbursement to the state.

Since the amendment in 1959, sec. 77.10(2)(a), Stats., provides that, "A county may withdraw county-owned lands from this chapter under s. 28.12." The latter section, which had been enacted in 1947, required reimbursement to the state and set up a formal procedure to be observed by the county board in connection with a withdrawal. The defendant argues that the 1959 change was not intended to present an exclusive means by which a county could withdraw its lands. We, however, are not able to adopt the defendant's construction. Our interpretation of the statutory language requires the conclusion that the 1959 amendment is aimed at all proposed withdrawals of county-owned lands. Accordingly, the contemplated withdrawal on the part of Vilas county required that such county follow the provisions of sec. 28.12.

The defendant also claims that the county had a contractual right under the pre-existing statutes of the Forest Crop Law, which right was constitutionally inviolable. We recognize that the language of sec. 77.03, Stats., on its face appears to support the defendant's contention. The language of the statute, in part, is here quoted:

"The passage of this act, petition by the owner, the making and recording of the order hereinbefore mentioned shall constitute a contract between the state and the owner, running with said lands, for a period of fifty years, unless terminated as hereinafter provided, with privilege of renewal by mutual agreement between the owner and the state, whereby the state as an inducement to owners and prospective purchasers of forest crop lands to come under this chapter agrees that until terminated as hereinafter provided, no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands, except as the conservation commission and the owner may expressly agree in writing."

Notwithstanding the above-quoted statute, we are obliged to conclude that the legislature was not legally bound by it. The law is clear in Wisconsin that the legislature, in its relationship with municipal or quasi-municipal corporations of the state, is not obliged to heed prior legislative expressions. Thus, the legislature by statute can take away from a municipality what it has previously given to it by statute. *Madison Metropolitan Sewerage Dist.* v. *Committee* (1951), 260 Wis. 229, 242, 50 N.W. (2d) 424. We recently expressed a related concept in *Ashwaubenon* v. *Public Service Comm.* (1963), 22 Wis. (2d) 38, 125 N.W. (2d) 647, when we pointed out that fixed and vested rights are not obtained in connection with a waterway intrusion which had been authorized by the legislature. At page 49 of the *Ashwaubenon Case*, we said:

"It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount and the rights of others are subject to revocation at the pleasure of the legislature."

This court has often said that a municipal corporation does not have a vested right in an enactment of the legis-

lature. The state retains the inherent power to redefine the relative rights of the county in the forest crop program.

The right of a county to challenge acts of the legislature is sharply restricted. *State ex rel. Martin* v. *Juneau* (1941), 238 Wis. 564, 571, 300 N.W. 187. This view is based on the fact that the county is a creature of the state and exists in large measure to help handle the state's burdens of political organization and civil administration. We recognized this concept in *School Dist.* v. *Callahan* (1941), 237 Wis. 560, 570, 297 N.W. 407, wherein we quoted from *Hunter* v. *Pittsburgh* (1907), 207 U.S. 161, 178, 179, 28 Sup. Ct. 40, 52 L. Ed. 151:

> " 'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.' "

We reached a comparable conclusion in the recent case of *Columbia County* v. *Wisconsin Retirement Fund* (1962), 17 Wis. (2d) 310, 317, 116 N.W. (2d) 142. See also *Douglas County* v. *Industrial Comm.* (1957), 275 Wis. 309, 81 N.W. (2d) 807; *State ex rel. Bare* v. *Schinz* (1927), 194 Wis. 397, 216 N.W. 509.

Since the lands from which the seized logs were cut had never validly been withdrawn from entry under the Forest Crop Law, we conclude that the defendant was properly convicted of a violation of sec. 26.06(2), Stats., for his unlawful removal of the seizure notices.

By The Court. —Order affirmed.

BEILFUSS, J., took no part.

APPENDIX B

STATE OF WISCONSIN COUNTY COURT VILAS COUNTY

In the Matter of the
STATE OF WISCONSIN
v.
ANTHONY MUTTER

MEMORANDUM OPINION

The above matter had come before the County Court for Vilas County, George Sullivan, acting County Judge, on the 9th day of May, 1962; appearing in person was the defendant Anthony Mutter, and also Edward D. Cleveland, defendant's attorney, of the firm of Whyte, Hirschboeck, Minahan, Harding & Harland; representing the State of Wisconsin was Calvin A. Burton, District Attorney. The defendant through his attorney has filed a *Motion to Dismiss Complaint* as a matter of law on the grounds, *first*, that the lands upon which the timber products were cut had been effectively withdrawn as forest crop lands pursuant to s. 77.10(2)(a), Wis. Stats., and, *second*, that neither the Conservation Commission, nor any other agency of the State, had the authority to place such tags upon such timber products because the products were on lands withdrawn from entry under the forest crop law.

The District Attorney for Vilas County in reply insists, in effect, that the defendant Anthony Mutter is estopped from raising the issue of the legality of the withdrawal of these lands from entry under the forest crop law as a defense in the instant criminal matter because said defendant, as an individual, does not have a sufficient legal interest in said lands to raise such a defense.

There is no doubt in the mind of the Court that the defendant is fully within his rights to raise the issue as a matter of law that he did nothing illegal in removing the aforesaid eight seizure notices because these notices had not been legally placed on the timber in question because the lands involved had already been properly withdrawn from entry under the forest crop law. That right he unquestionably has.

The County Court finds as follows in regard to the two basic issues raised by the attorney for the defendant Mutter:

The Question of Whether Said Lands Had Been Legally Withdrawn from Entry.

The Court finds that said lands had not been effectively withdrawn from entry under the Forest Crop Law.

The amendment to the Forest Crop statutes, by Chapter 195, Laws of Wisconsin, established a procedure for withdrawal of these forest crop lands. The sentence: "A county may withdraw county-owned lands from this chapter under s. 28.12." establishes a procedure for said withdrawal.

The contention of defendant and his attorney is that such amendment is of no force and effect as it applies to lands entered under the forest crop act prior to the enactment of this amendment, since it would alter a "contract" between the county (here Vilas County) and the State of Wisconsin.

The Court finds that Vilas County here in its management of forest crop lands is acting as an "arm of the State" as expressed in *State ex rel Martin* v. *Juneau*, 238 Wis. 564, and the later amendment to the Forest Crop law has been effective in changing the terms under which the forest crop lands were held. The forest crop law is

purely statutory and the intent of the legislature was to provide for reimbursement to the State for moneys advanced prior to withdrawal of lands, regardless of for whatever purpose. A County cannot object to a change in the rights and powers conferred on it by the original forest crop law.

Whether The Seizure Notices Were Legal Seizure Notices.

It also follows then based on the above finding that the notices attached by the State were legal seizure properly attached.

The Court, therefore, denies the *Motion to Dismiss* by defendant's attorney and is prepared to set a time for trial for defendant.

By The Court:
(s) *George Sullivan*
Acting County Judge

APPENDIX C

STATE OF WISCONSIN IN CIRCUIT COURT FOR VILAS COUNTY

STATE OF WISCONSIN,
Plaintiff,
v.
ANTHONY MUTTER,
Defendant.

MEMORANDUM OPINION

Hon. BRUCE F. BEILFUSS, Circuit Judge presiding.

Appearances:

For the State:
JOHN W. REYNOLDS, Attorney General,
by JOHN H. BOWERS, Assistant Attorney General.

For the Defendant:
WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND,
735 N. Water Street, Milwaukee, Wisconsin,
by EDWARD D. CLEVELAND

Upon stipulated facts the defendant was found guilty of a violation of sec. 26.06(2) Wis. Stats., a misdemeanor, by the County Court of Vilas County, the Honorable George Sullivan, acting County Judge. The defendant has appealed to this, the Circuit Court for Vilas County, Wisconsin.

The parties, by their respective counsel, have stipulated that the court may determine the issue upon the record, including the stipulation of facts, and upon all records and proceedings, including the briefs filed in County Court and affidavits submitted subsequent thereto.

The issues are presented to the court in the form of a motion to dismiss the complaint.

The principal problem involved is a question of the validity of a 1959 amendment to the Forest Crop Law.

The complaint alleges in part that the defendant, Anthony Mutter, did on or about the 20th day of December, 1961, unlawfully remove eight seizure notices of the State Conservation Commission, contrary to sec. 26.06(2) of the Wisconsin Statutes.

The defendant, Anthony Mutter, was appointed county forester for Vilas County in November, 1957, and has acted in that capacity since that time. The County Board also created a Forestry and Land Committee to "administer all county lands entered under forest crop and all of the lands of Vilas County Forest reserve and . . . all other lands owned by Vilas County", and to have ". . . supervision of the administration use or disposition of all county owned lands, forest and forest products." The county forester is employed by the county pursuant to authority of the committee subject to approval of the county board.

The lands in question were entered as Forest Crop Lands pursuant to Chapter 77, Wis. Stats., and resolutions of the county board between the years 1933 to 1945.

On August 3, 1961, pursuant to its resolutions, the county board sent to the Wisconsin Conservation Commission a Declaration of Withdrawal of all the Vilas County lands from the forest crop law.

In October, 1961, the county advertised for timber sales upon the land in question and other lands.

In November, 1961, the defendant Mutter, as county forester, pursuant to authority from the county board entered into contracts with several individuals for the sale of timber on the lands in question.

Pursuant to timber sales agreements the individuals commenced the cutting and removal of timber. On or about December 20, 1961, agents of the Wisconsin Conservation Department placed confiscation tags on some of the timber that had been cut. On December 24, 1961, the defendant, Mutter, removed eight of the tags and his arrest followed.

It is assumed by the parties that prior to the 1959 amendment to Sec. 77.10(2)(a), (Chapter 195 Laws of 1959), that the county could withdraw lands from the Forest Crop Law without reimbursement to the state of state aids if the purpose of withdrawal was for other than sale. (See 46 O.A.G. 16—1957).

If the purpose of withdrawal was for sale other than to the state or local unit of government the county was required to make reimbursement to the state of moneys received or in case of timber sale a certain percentage of the value of the timber sold. (Sec. 28.12 and 20.280(80) to (85)).

Section 77.10(2)(a) provided that any owner could elect to withdraw lands from forest crop by the payment by the owner, except a county, of taxes that would ordinarily have been assessed. The 1959 amendment added a final sentence to the section, to-wit: "A county may withdraw county-owned lands from this chapter under s. 28.12."

It is the contention of the state that the purpose of the 1959 amendment was to prevent counties from withdrawing their land from the present forest crop without reimbursement to the state, and the amendment now in effect provides that county forest crop lands can be withdrawn only for the purpose of sale under Sec. 28.12, and this amendment is valid.

It is the opinion of the court that it was the intention of the legislature to provide that the county could withdraw lands only for purpose of sale of the land so as to prevent a situation where the state would receive no reimbursement of aids advanced to the county.

The defendant contends that the amendment is unconstitutional in that it is retroactive and cannot impair the obligation of contract between the subdivision and the state itself.

While the defendant here is an individual, he was acting in his official capacity as county forester. It is the county rather than Anthony Mutter individually who has the interest in the basic problem.

As a general proposition the law is clear that a county has no right to challenge the constitutionality of a state statute.

"A county as a quasi-municipal corporation and as an arm of the state has no right to question the constitutionality of the acts of its superior and creator, or of another arm or governmental agency of the state. A county or a governmental agency is created almost exclusively in the view of the policy of the state at large for purposes of political organization and civil administration in matters of state concern." 1 *McQuillin Mun. Corp.* (3rd ed.) PP 311, 497 secs. 1.88, 2.46. *Young* v. *Juneau County* (1927) 192 Wis. 646; 212 N.W. 295.

See also *State ex rel Bare* v. *Schinz* (1927) 194 Wis. 397. *Douglas County* v. *Industrial Commission* (1957) 275 Wis. 313, 314; 81 N.W. (2d) 807.

The stipulation of facts sets forth that the county owned the land in its proprietary capacity. Whether the lands were held in governmental or proprietary capacity is a question of law rather than fact.

Sec. 77.01 sets forth the purpose of the Forest Crop Law:

> "It is the intent of this chapter to encourage a policy of preserving from destruction or premature cutting the remaining forest growth in this state, and of reproducing and growing for the future adequate crops of forest products on lands not more useful for other purposes, so that such lands shall continue to furnish recurring forest crops for commercial use, all in a manner which shall not hamper the towns in which such lands lie from receiving their just tax revenue from such lands."

The preservation and reproduction of forests and forest land is a matter of general public concern affecting the public interest of the state as a whole. When the county voluntarily entered their land in forest crop and accepted the benefits of the act they did in effect recognize and subscribe to the public purposes of the Act. If the county did hold the land in a proprietary capacity before it voluntarily entered it into forest crop land it lost its proprietary capacity as to the land at that time. It cannot accept benefits which were provided for a state wide public concern offered by its creator and then deny the existence of the public purpose and reassert its individual or proprietary interest. The contract was in furtherance of a governmental purpose and the constitutional defense of abrogation of contracts is not available to the county as against the state.

> ". . . neither the impairment-of-contract nor the due-process-of-law provisions of the federal and state constitutions have any application to the act of the legislature in retroactively taking away from the county its right of offset.
>
> "Counties, like other municipal corporations, are mere instrumentalities of the state, and statutes confer upon them their powers, prescribe their duties, and impose their liabilities. *Frederick* v. *Douglas County* (1897), 96 Wis. 411, 417; 71 N.W. 798; and *Commission-*

ers v. *Lucas* (1876), 93 U.S. 108, 114; 23 L. Ed. 822. Because of this, the legislature may, with the consent of the other party, revoke any contract entered into by a county or other municipal corporation in performance of a governmental function, and in so doing there is no violation of the constitutional prohibition against a state taking action to impair the obligation of a contract. This rule is stated in 37 Am. Jur., Municipal Corporations, pp. 699, 700, sec. 89, as follows:

> "'A contract to which a municipal corporation is a party, relating to a public and governmental matter, may, however, be revoked by the legislature with the consent of the other party without thereby violating the right of the municipality.'" *Douglas County* v. *Industrial Comm.* 275 Wis. 309, 313-314; 81 N.W. (2d) 807.

It is the opinion of the court that the amendment to Sec. 77.01(2)(a) is not unconstitutional and that it provides the only method of withdrawal of county forest crop lands and that the defendant did unlawfully remove the seizure tags.

The state also contends that the defendant as an individual cannot raise the constitutional question as a matter of defense to this criminal prosecution. While the court is of the opinion he is entitled to raise such defense a discussion of this issue is not necessary because of the court's opinion that the legislative act is constitutional.

It follows that the motion to dismiss is denied and that the judgment of conviction of the county court is affirmed and reinstated.

Attorneys for the state may draw the necessary order to give effect to this opinion.

Dated June 7, 1963.

BY THE COURT:

(s) Bruce F. Beilfuss
Circuit Judge

APPENDIX D

SECTIONS 77.03, 77.10(2(a) and 28.12, WISCONSIN STATUTES, 1961

"77.03 TAXATION OF FOREST CROP LANDS. From and after the filing of the order with the officers mentioned in subsection (3) of section 77.02 the lands described therein shall be 'Forest Crop Lands,' on which taxes shall thereafter be payable only as hereinafter provided. The passage of this act, petition by the owner, the making and recording of the order hereinbefore mentioned shall constitute a contract between the state and the owner, running with said lands, for a period of fifty years, unless terminated as hereinafter provided, with privilege of renewal by mutual agreement between the owner and the state, whereby the state as an inducement to owners and prospective purchasers of forest crop lands to come under this chapter agrees that until terminated as hereinafter provided, no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands, except as the conservation commission and the owner may expressly agree in writing. If at the end of fifty years said contract is not renewed by mutual consent, the merchantable timber on said land shall be estimated by an estimator jointly agreed upon by the conservation commission and the owner, and in the event said conservation commission and said owner fail to agree, then and in that event, an estimator shall be appointed by the judge of the circuit court of the district in which said lands lie, whose estimate shall be final, and the cost thereof shall be borne jointly by the conservation commission and the owner; and the ten per cent severance tax paid on the stumpage thereon as agreed in the same manner as if said stumpage has been cut. The owners by such contract consent that the public may hunt and fish on said lands, subject to such regulations as the conservation commission may from time to time prescribe."

SECTION 77.10(2)(a)

"(2) ELECTION TO WITHDRAW LANDS. (a) Any owner of forest crop lands may elect to withdraw all or any of such lands from this chapter, by filing with the conservation commission a declaration withdrawing from this chapter any description owned by him which he specified, and by payment by such owner, other than a county, to the conservation commission within 30 days the amount of all real estate tax that would ordinarily have been charged against such lands had they not been subject to this chapter with simple interest thereon at 5 per cent per annum, less any severance tax and supplemental severance tax or acreage share paid thereon, with interest computed according to the rule of partial payments at the rate of 5 per cent per annum. The exact amount of such tax shall be determined by the department of taxation after hearing and upon due notice to all parties interested, provided that when the tax rate of the current year has not been determined the rate of the preceding tax year may be used. On receiving such payment the conservation commission shall issue an order of withdrawal and file copies thereof with the department of taxation, the supervisor of assessments, the clerk of the town and the register of deeds of the county in which such land lies. Such land shall then cease to be forest crop lands. A county may withdraw county-owned lands from this chapter under s. 28.12."

"28.12 WITHDRAWAL AND SALE OF COUNTY FOREST LANDS. The county board by resolution may authorize withdrawal of county forest lands from entry under the forest crop law and sale to the state or to any local unit of government at an agreed price. In the case of sale to any other purchaser the following provisions shall govern:

"(1) All applications for the purchase of county forest lands shall be addressed or referred to the committee designated by the county board to administer county forests.

"(2) The committee shall advise the conservation commission, which shall provide for an examination and report on the character of the land, the volume of timber and any other special values, and shall set a minimum valuation based on such report. In transmitting its valuation, the commission shall give its recommendations for or against sale of the property.

"(3) Any county board resolution authorizing withdrawal and sale of county forest lands to any purchaser other than the state or a local unit of government shall require a two-thirds vote of the membership of the board and shall instruct the county clerk to publish a notice of sale, listing the lands, the minimum bid, the amount of the payment accompanying the bid and the time and place for opening of bids by the committee designated to administer county forests. In case a successful bidder withdraws his bid the accompanying deposit shall be forfeited to the county.

"(4) When forest crop lands are withdrawn and sold to any purchaser other than the state or a local unit of government, the county shall reimburse the state in the amount previously paid out on the withdrawn lands under s. 20.280(72) and any such receipts shall be credited to the same section.

"(5) In cases of withdrawal of scattered county forest crop lands the conservation commission shall waive reimbursement where it finds that such withdrawal will result in county forest boundaries conforming with best use of the land."

Office-Supreme Court, U.S.
FILED
OCT 6 1964
JOHN F. DAVIS, CLERK

No. 495

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO DISMISS AND BRIEF

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

Post Office Address:

Room 114 East
State Capitol
Madison, Wisconsin

INDEX TO MOTION TO DISMISS

PAGE

MOTION TO DISMISS 1-2

S. Ct. Rule 16, paragraph 1 (b) 1

United States Constitution Article I, sec. 10 ..... 1, 2

INDEX TO BRIEF IN SUPPORT OF MOTION

SUBJECT INDEX

NATURE OF THE CASE 1

STATEMENT OF FACTS 2-4

JURISDICTION 4

QUESTIONS PRESENTED 5

ARGUMENT 6-13

I. DEFENDANT MUTTER, NOT A PARTY TO THE CONTRACT, DELIBERATELY VIOLATED THE LAW AS IT EXISTED ON THE DATE OF THIS VIOLATION AND HENCE HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THAT LAW 6

II. THE STATUTE, CHAPTER 195 OF THE LAWS OF 1959, IS CONSTITUTIONAL UNDER THE FACTS IN THIS CASE 7-13

a. *There is neither allegation or proof, nor could there be any, that any innocent third party having valid contractual rights with the county has been injured* 7

PAGE

B. Absent such a fact status as is pointedly discussed in paragraph (a) the power of the state over its subordinate municipalities is paramount 7-12

c. Gomillion v. Lightfoot distinguished 13

CONCLUSION 14

CERTIFICATE OF SERVICE 15

CASES CITED

Dodge v. Board of Education (1937) 302 U. S. 74, 58 S. Ct. 98, 82 L. ed. 57 10

Gomillion v. Lightfoot (1960) 364 U. S. 339, 81 S. Ct. 125, 5 L. ed. (2d) 110 13

Graham v. Folsom (1906) 200 U. S. 248, 26 Sup. Ct. 245, 50 L. ed. 464 8

Hall v. State (1880) 103 U. S. 5, 26 L. ed. 302 9

Hooker v. Burr (1904) 194 U. S. 422, 24 S. Ct. 706, 48 L. ed. 1046 6

Hunter v. Pittsburg (1907) 207 U. S. 161, 28 Sup. Ct. 40, 52 L. ed. 151 ..... 10, 11

Mobile v. Watson (1886) 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620 8

PAGE

Mt. Pleasant v. Beckwith (1879) 100 U. S. 514, 34 Sup. Ct. 317, 25 L. ed. 699 8

State of Indiana ex rel. Anderson v. Brand (1938) 303 U. S. 95, 58 S. Ct. 443, 82 L. ed. 685 ..... 9, 10

The Trustees of Dartmouth College v. Woodward (1818) 17 U. S. 518 9

Trenton v. New Jersey (1923) 262 U. S. 182, 43 S. Ct. 534, 67 L. ed. 937 ..... 10, 11, 12

Williams v. Mayor of Baltimore (1933) 289 U. S. 36, 53 Sup. Ct. 431, 77 L. ed. 1015 ..... 7, 12

Worcester v. Worcester Consolidated Street Railway Co. (1905) 196 U. S. 539, 25 Sup. Ct. 527, 49 L. ed. 591 12

CONSTITUTION

United States Constitution

Article I, sec. 10 ..... 4, 5, 6, 13

Fifteenth Amendment 13

OTHER AUTHORITIES

46 Op. Atty. Gen. of Wis., p. 16 (1957) 3

Sup. Ct. Rule 35, paragraph 1 1

STATUTES

PAGE

Wisconsin Statutes

Sec. 26.06 (2) 2, 4

28.12 3

77.10 (2) (a) 3

Ch. 28 2

7. 2

195, Laws of 1959 ..... 3, 4, 7

227 3

No.....

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO DISMISS

Pursuant to paragraph 1 (b) of Rule 16 of rules of the Supreme Court of the United States, the State of Wisconsin, by its Attorney General, moves to dismiss the appeal upon the ground that the appeal does not present a substantial federal question in the following respects:

1. Appellant seeks to invoke the provisions in Article I, Section 10 of the United States Constitution forbidding state legislation impairing the obligations of contract. Appellant is not a party to the contract claimed to be impaired and had no legal, financial, beneficial or equitable interest therein.

2. Appellant never pleaded or proved facts to establish terms of the contract claimed to have been impaired by subsequent state legislation. Specifically he did not allege or prove that either himself or any other person, natural or corporate, had contractual rights with the county which would be impaired or adversely affected by the state legislation complained of. Hence the following rule is applicable.

3. Counties are only subordinate agencies of the state and the state, as far as Article I, Section 10 is concerned, has complete power to amend their controlling statutes or charter or to abolish the counties entirely. Further, that the power of a state by legislation to affect its working agreements or relations with the county on the facts shown in this record is fully established by authoritative decisions of this court.

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF IN SUPPORT OF MOTION TO DISMISS

Pursuant to paragraph 1, of Rule 35 of the Rules of the Supreme Court of the United States, the State of Wisconsin files this its brief in support of its motion to dismiss the appeal herein.

NATURE OF THE CASE

This is an appeal by Anthony Mutter from a judgment of the Supreme Court of Wisconsin upholding his conviction on a charge of unlawfully removing state seizure tags from lumber cut on county forest property entered under the State Forest Crop Law. The decision of the Wisconsin Supreme Court has been reported in 23 Wis. 2d 407, 127

N. W. (2d) 15 (1964) which is appended to the jurisdictional statement of appellant as appendix A. This judgment of the Supreme Court of the State of Wisconsin affirmed a judgment of the Circuit Court for Vilas County, Wisconsin which had in turn affirmed a conviction of appellant in county court for Vilas County, Wisconsin, convicting the defendant of a charge defined in Section 26.06 (2) of the Wisconsin Statutes, of removing seizure notices of the State Conservation Commission of Wisconsin from decked pulpwood cut on lands entered as forest crop lands under Ch. 77 Wisconsin Statutes.

STATEMENT OF FACTS

Anthony Mutter, an employee of Vilas County, on December 24, 1961, acting on his own initiative and responsibility, removed eight seizure notices of the Conservation Commission from decked pulpwood which had been cut from lands owned by Vilas County.

On December 19, 1961, the said logs had been seized by the Conservation Commission as logs which had been unlawfully cut from lands entered under the Forest Crop Law, Ch. 77, Wis. Stats. and seizure notices placed thereon. At the time of the offense the logs were in the constructive custody of the Conservation Commission.

Since 1927 Wisconsin has had statutes now found in Chapters 77 Wis. Stats. and Chapter 28, Wis. Stats. which provided for the protection, preservation and development of its forest lands, both privately owned and in county ownership. The principle of these laws was that taxes were to be deferred on privately owned lands and counties were

to be compensated for the development of county forest lands upon condition of later reimbursement to the State when the lands were sold or the timber cut, for the State funds advanced in the case of counties and for deferred taxes in the case of privately owned lands.

Through successive amendments of the basic statutes a quirk apparently appeared in the statutes which was pointed out in 46 Opinions of the Attorney General of Wisconsin, page 16 (1957) under which it appeared that the county could withdraw its lands from the entry under the Forest Crop Law, allegedly not for sale and thereafter cut the timber from the land and sell it without reimbursing the State for its advancement.

Thereafter by the Bill which became Ch. 195, Laws of 1959, which amended Sec. 77.10 (2) (a) it was attempted to plug this loophole by providing that the general provisions for withdrawal and sale found in Section 28.12 of the Wisconsin Statutes, applied to all county withdrawals. It was this amendment to the statutes which Mutter apparently acting on assumed authority of Vilas County attempted to challenge by the device of purporting to withdraw lands from entry and to thereafter enter into timber sales contracts.

Wisconsin law provides an orderly method of reviewing the validity of the attempted withdrawals under Ch. 227, Wis. Stats. which is the Wisconsin Administrative Procedure Act.

Instead of attempting to review the validity of the purported withdrawal of lands under this statute, in October 1961 the Vilas County Forestry and Land Committee ad-

vertised timber sales on various lands, most of which had been entered under The Forest Crop Law in 1933 and including one parcel entered in 1938 and one in 1945.

After the timber had been cut, agents of the State Conservation Commission of Wisconsin placed seizure notices on the decked logs in order to protect their right to reimbursement for the funds advanced to the county.

Instead of proceeding through judicial means to determine the validity of the seizure, Anthony Mutter, apparently on his own initiative, went and removed the seizure notices from the decked logs. He was thereupon arrested and charged with violation of Section 26.06 (2) Wis. Stats. and was duly convicted in county court, affirmed in Circuit Court, and affirmed on appeal to the Wisconsin Supreme Court.

His defense, which is the basis of this appeal. was that the 1959 Statute of the State of Wisconsin, Ch. 195 of the Laws of 1959, was a violation of Article I, Section 10 of the Constitution of the United States and of no other provision. It i the validity of that contention which is now before the court.

JURISDICTION

Jurisdiction is opposed on the ground that no substantial federal question is involved.

QUESTIONS PRESENTED

I. Can Anthony Mutter, not a party to the contract, acting on December 24, 1961, claim that an amendment to the Statutes governing the county forest laws passed as of 1959 was a violation of Article I, Section 10 of the United States Constitution.

II. Under the controlling decisions of this court and the facts shown by the record herein, does not the State of Wisconsin have the right to alter or amend its own contract or working agreement with Vilas County when the effect of the amendment is solely to assure reimbursement to the State of funds which originally came from the state treasury.

ARGUMENT

I. Defendant Mutter, not a party to the contract, deliberately violated the law as it existed on the date of this violation and hence has no standing to challenge the constitutionality of that law.

On this point we respectfully suggest that the case is controlled by:

Hooker v. Burr (1904) 194 U. S. 422, 24 S. Ct. 706, 48 L. ed. 1046.

In Hooker, an independent purchaser at a foreclosure sale held after the date of the passage of the statute amending the foreclosure laws, attempted to claim that a previous amendment of the foreclosure laws was unconstitutional and that he should have the benefit of the law as it existed prior to the date of the amendment of the Statutes.

The court clearly and definitely held that the independent purchaser coming in after an amendment of the law had to accept the Statutes as they existed at the time of his purchase and he could not allege the unconstitutionality of a previous amendment on the ground that it violated the United States constitutional rule against the impairment of contracts under Article I, Section 10 of the United States Constitution.

In the instant case Mutter, as we have shown in our statement of facts, deliberately violated the State Statute passed more than two years before the date of his violation. Mutter must take the State Statutes as he finds them and cannot thereafter argue that the rights of the third party, in this case the county, protect him in his violation.

II. The Statute, Chapter 195 of the Laws of 1959, is constitutional under the facts in this case.

a. There is neither allegation or proof, nor could there be any that any innocent third party having valid contractual rights with the county has been injured.

The law is clearly established that any person challenging the constitutionality of a Statute has the burden of proving every fact necessary to establish that unconstitutionality. Out of the host of cases which could be cited to this proposition we will refer to only one.

Williams v. Mayor of Baltimore (1933) 289 U. S. 36, 42, 53 Sup. Ct. 431, 77 L. ed. 1015.

As we will show in our analysis of the cases cited in the respective briefs, if Vilas County had made a valid contract with some third party which depended upon the continued existence of the Statutes as they existed prior to 1959, then there might be a valid claim that the Statute of 1959 was unconstitutional. No such claim was made by any pleading, no proof was adduced that such a state of facts existed.

b. Absent such a fact status as is pointedly discussed in paragraph (a), the power of the state over its subordinate municipalities is paramount.

Contrary to appellant's completely unfounded assertion on page 7 of his brief that the appeal herein presents an issue which has never been decided by this court or by any other court in the land, we respectfully submit and urge that the law is clearly settled as far as any law ever

can be for those who are willing to read and analyze the cases.

The rule of law which we submit is settled may be succinctly stated as follows:

If a municipality has entered into a valid contract with a third person, a private party, the State cannot pass a valid Statute which will interfere with the rights established by that contract. Conversely, if there is no third party involved, the municipality has no vested rights whatsoever against the State and the State has paramount power to control its creature municipality.

In the first group of cases we will find primarily bond cases where the effect of the State Statute would be to in effect default on bonds issued by the municipality. These cases are:

Graham v. Folsom (1906) 200 U. S. 248, 26 Sup. Ct. 245, 50 L. ed. 464;

Mt. Pleasant v. Beckwith (1879) 100 U. S. 514, 34 Sup. Ct. 317, 25 L. ed. 699;

Mobile v. Watson (1886) 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620.

In all three of these cases Statutes which would invalidate contracts and destroy the rights of private citizens holding obligations of the municipality affected were held invalid. Two cases which are often cited in this connection, which are clearly not in point, involve direct contracts between the State itself and a private citizen. Examples of this class are:

Hall v. State (1880) 103 U. S. 5, 26 L. ed. 302;

State of Indiana ex rel. Anderson v. Brand (1938) 303 U. S. 95, 58 S. Ct. 443, 82 L. ed. 685.

In the *Hall* case, which arose in Wisconsin, the legislature had passed an act to provide for a Geological, Mineralogical, and Agricultural Survey of the State. Under the authority of this Statute, Hall signed a contract executed by the Governor in the name of the State. All that this case held was that the State could not repudiate its contract of employment with Hall. It has nothing to do with the power of a State over its municipalities. Similarly, the *Indiana* case appears to be a case of a contract between the State itself and its teachers to provide for tenure. This too does not involve any power of the State over its municipalities.

The *Hall* case expresses the reason needed for this rule on page 11 as follows:

> "When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. *Davis v. Gray,* 16 Wall. 203."

A somewhat related case is the famous Dartmouth College case:

The Trustees of Dartmouth College v. Woodward 17 U. S. 518 (1818).

In this case the court held that a charter rendered by a sovereign to a private corporation was a contract which could not be affected by subsequent state legislation. Quaere, would this rule be effective today in those states

which by their constitutions have reserved the right to alter, amend or repeal charters granted by the State after the constitution is adopted?

A related case which is again not a case involving the power of the State over municipality is

Dodge v. Board of Education (1937) 302 U. S. 74, 58 S. Ct. 98, 82 L. ed. 57.

This case again was not a case involving the power of the State over the municipality. In this case, contrary to the result in the *Indiana* case, the court held that a provision for a teacher's annuity was not established by contract under the controlling statutes and hence the provision for the annuity was not protected by the contract laws of the United States Constitution. In this case the court stated at page 78:

> "On the other hand an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the Legislature."

On the other hand, where the facts show that the contractual rights of no private third parties are involved, the cases clearly establish that the State power over the municipality is complete.

The leading cases on this point are:

Trenton v. New Jersey (1923) 262 U. S. 182, 43 S. Ct. 534, 67 L. ed. 937;

Hunter v. Pittsburg (1907) 207 U. S. 161, 176, 28 Sup. Ct. 40, 52 L. ed. 151, 158.

Of these the most often quoted case is the case of *Hunter v. Pittsburg.*

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

The case of *Trenton v. New Jersey* contains, particularly at pages 262 U. S. 186 and 187, 67 L. ed. pp. 940, 941, an exhaustive analysis of the subject discussing many cases and quoted with approval from *Hunter v. Pittsburg* (207 U. S. p. 178) a portion of the quotation set forth immediately above.

The *Pittsburg* case involved a claim that the State did not have power to establish a coercive consolidation of the

cities of Pittsburg and Allegheny over the wishes of the Allegheny inhabitants. The *Trenton* case held that the State could take away from the city of Trenton a previously existing alleged right to take water for the uses of the city of Trenton from the Delaware River without charge, and imposing a charge after the passage of the Statute. In both cases the Statutes were upheld in trenchant opinions.

Another case involving the exercise of State sovereign power over its municipalities is the case of *Williams v. Mayors* (1933) 289 U. S. 36, 53 Sup. Ct. 431, 77 L. ed. 1015.

In this case the court upheld over the violent opposition of the cities of Baltimore and Annapolis the power of the Maryland legislature to exempt a certain insolvent railroad from local taxation over the objection of the two municipalities. Another related case is *Worcester v. Worcester Consolidated Street Railway Co.* (1905) 196 U. S. 539, 25 Sup. Ct. 527, 49 L. ed. 591.

In this case the court upheld over the objections of the city of Worcester the right of the State to change the method in which the Street Railway would pay for certain paving. This case is of interest because there was a contract between the city of Worcester and the Street Railway, but the court held that the third party, Street Railway, could consent to an abrogation of the contract and accept the State Statute. The court stated that the provisions of the contract clause were intended for the protection of the third parties and not for the protection of the municipalities.

c. *Gomillion v. Lightfoot distinguished*

The case of *Gomillion v. Lightfoot* (1960) 364 U. S. 339, 81 Sup. Ct. 125, 5 L. ed. (2d) 110, has no bearing on this case whatsoever. Here the constitutional provision involved was the 15th Amendment and not Article I, Section 10. In its decision the court stated:

> "• • • Thus a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, *but rather that the State's authority is unrestrained by particular prohibitions of the Constitution considered in those cases.*" (Emphasis added)

Here is a clear ruling by the court itself in the *Gomillion* case that the ruling in the *Gomillion* case does not affect cases arising under Article I, Section 10 of the Constitution.

CONCLUSION

We respectfully submit that the rule of law established by the cases in the various classes is clear, that this appeal not only does not present a question which is substantial but presents no question at all,

We respectfully submit that jurisdiction should not be noted.

Respectfully submitted,

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

Dated this 1st day of October, 1964

CERTIFICATE OF SERVICE

I, Roy G. Tulane, a member of the Bar of this Court, hereby certify that I have this day served the foregoing Motion to Dismiss and Brief in Support thereof upon the Counsel of Record for the Appellant herein, by mailing a copy thereof with first class postage prepaid, addressed as follows:

Edward B. Cleveland
Attorney at Law
2100 Marine Plaza
Milwaukee, Wisconsin 53202

ROY G. TULANE
Assistant Attorney General
of Wisconsin

Counsel of Record for Appellee

Dated this 5th day of October, 1964.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 24 1964
JOHN F. DAVIS, CLERK

No. 495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION TO MOTION TO DISMISS

ROGER C. MINAHAN
EDWARD D. CLEVELAND
2100 Marine Plaza
Milwaukee, Wisconsin 53202
Attorney for Anthony Mutter, Appellant

WHYTE, HIRSCHBOECK, MINAHAN,
HARDING & HARLAND
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX OF BRIEF IN OPPOSITION TO MOTION TO DISMISS

	PAGE
Statement of Facts	2
Questions Presented	2
Argument	4
I. Appellant Mutter has standing to assert the unconstitutionality of the statute, where the interpretation of that statute provides the sole support for his conviction	4
II. Amendments to the Wisconsin Statutes have been construed to impair the obligations of a contract existing between the State and Vilas County, with injurious consequences to Appellant.	8
a. It is immaterial in this case, whether the obligations of a contract between the county and a private party were impaired	8
b. None of the cases cited by Appellee, and no case heretofore decided by this Court, has ever held that a state is free to abrogate an express statutory contract it has made with one of its subdivisions	9
Conclusion	13

Cases Cited

PAGE

Baker v. Carr, 369 U.S. 186, 82 Sup. Ct. 691, 7 L.Ed. (2d) 663 (1962) 5

Barrows v. Jackson, 346 U.S. 249, 73 Sup. Ct. 1031 97 L.Ed. 1586 (1953) 5, 7, 8

Buchanan v. Warley, 245 U.S. 60, 38 Sup. Ct. 16, 62 L.Ed. 149 (1917) 6, 8

Communist Party of the U.S. v. Subversive Activities Control Board, 367 U.S. 1, 81 Sup. Ct. 1357, 6 L.Ed. (2d) 625 (1961) 6

Gomillion v. Lightfoot, 364 U.S. 339, 81 Sup. Ct. 125, 5 L. Ed. (2d) 110 (1960) 9

Grogan v. San Francisco, 18 Cal. 590 (1861) 12

Hooker v. Burr, 194 U.S. 415, 24 Sup. Ct. 706, 48 L.Ed. 1046 (1904) 4

Hunter v. Pittsburgh, 207 U.S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907) 9

International Harvester Co. v. Wisconsin Department of Taxation, 322 U.S. 435, 64 Sup. Ct. 1060, 88 L.Ed. 1373 (1944) 7

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 Sup. Ct. 624, 95 L.Ed. 817 (1951) 5

Pierce v. Society of Sisters, 268 U.S. 510, 45 Sup. Ct. 571, 69 L.Ed. 1070 (1925) 7

Shelley v. Kraemer, 334 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161 (1948) 7

Trenton v. New Jersey, 262 U.S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937 (1923) 9

PAGE

Traux v. Raich, 239 U.S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131 (1915) 6

Tyler v. Judges of the Court of Registration, 179 U.S. 405, 21 Sup. Ct. 206, 45 L.Ed. 252 (1898) 4

Williams v. Mayor of Baltimore, 289 U.S. 36, 53 Sup. Ct. 431, 77 L.Ed. 1015 (1933) 9

Worcester v. Worcester Consolidated Street Railway Co., 196 U.S. 539, 25 Sup. Ct. 327, 49 L.Ed. 591 (1905) 10

United States Constitution

Article I, Section 10 9

Statutes

Wisconsin Statutes, 1961

Section 26.06(2) 4, 5

Section 77.03 10

Chapter 227 2

Chapter 195, Laws of 1959 ..... 5, 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 495

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee has moved to dismiss the appeal on the ground that it does not present a substantial federal question. The Appellant files this brief in opposition to such motion to dismiss the appeal.

STATEMENT OF FACTS.

The facts pertinent to this appeal have been stated in Appellant's Jurisdictional Statement, and have been summarized in Appellee's Brief in Support of Motion to Dismiss. Appellee's summary is replete with unwarranted characterizations of the facts. One such characterization requires comment here.

Appellee states that Ch. 227, Wis. Stats., the Wisconsin Administrative Procedure Act, provides an "orderly method" of reviewing attempted withdrawals under the Forest Crop Law. From this unsupported—and unsupportable—assertion, Appellee's Brief implies that Vilas County's failure to seek administrative review should be condemned; and that Appellant's action in removing purported seizure notices, which was taken in the belief that county lands had been validly withdrawn, ought also to be condemned without reference to whether the withdrawal was effective or not.

Such assertions and implications are wholly irrelevant to this appeal. They are not properly included in Appellee's statement of facts and deserve no consideration by the Court.

QUESTIONS PRESENTED

We submit that Appellee's second question prejudicially misstates the issue before the Court on this appeal.

Appellee's second question characterizes the state's action as having amended or altered its own "contract or *working agreement* with Vilas County." There is a profound difference between a contract of the state and a mere "working agreement" with its political subdivision. In upholding the Appellant's conviction, the Wisconsin

Supreme Court found that a statutory contract, not a working agreement, had been altered by subsequent legislation. No doubt Appellee would like to obscure the distinction, thereby hoping to avoid the whole question of the state's violation of the contract clause in the United States Constitution.

Appellee's second question also states that the effect of the subsequent state-enacted statute was "solely to assure reimbursement to the State of funds which originally came from the state treasury." Such a statement seems calculated to inject an equitable consideration into the case which is entirely impertinent to the constitutional question here involved. If equity were to control, it could easily be demonstrated that the counties of Wisconsin, including Vilas County, have yielded up to the state under the Forest Crop Law, in forest mill taxes and severance taxes, far more than they have ever received in state aids. But this is not the concern of the Court on this appeal. The question here must properly be formulated in conformity with the Wisconsin Supreme Court's decision that the effect of the statutory amendments was to deprive the county of a means of withdrawal previously guaranteed to remain an inviolable contract right.

ARGUMENT.

I. APPELLANT MUTTER HAS STANDING TO ASSERT THE UNCONSTITUTIONALITY OF THE STATUTE, WHERE THE INTERPRETATION OF THAT STATUTE PROVIDES THE SOLE SUPPORT FOR HIS CONVICTION.

The Appellee's suggestion that *Hooker* v. *Burr*, 194 U.S. 415, 24 S. Ct. 706, 48 L. Ed. 1046 (1904) controls this case is wholly without merit. *Hooker* held that a purchaser at a foreclosure sale acquired no rights or interest in the contract between mortgagor and mortgagee. Having no rights in that contract, it followed that the purchaser did not suffer any injury, even if the statute in question did impair the obligations of that contract. Following *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252 (1898), the Court held that the purchaser had no standing to assert that the statute impaired the obligation of that contract.

The Appellee appears to be arguing simply that Appellant Mutter has no standing to assert the constitutional rights of Vilas County. It is not clear what significance the Appellee ascribes to the time element here, nor to the gratuitous assertion that Mutter willfully violated Section 26.06(2), Wis. Stats. It is conceded that Mutter willfully removed the purported seizure notices, but to assert that Mutter thereby willfully violated Section 26.06(2) is to assume the very ground in controversy. It was the position of Mutter and his employer that the lands had been validly withdrawn from the Forest Crop Law; therefore, the purported seizure notices had no effect and were in fact an attempt by the State to convert the property of

the County. In no sense did Mutter *willfully* violate Section 26.06(2), Wis. Stats. If Ch. 195, L. 1959, as construed by the Wisconsin Supreme Court, is unconstitutional, Mutter could not have violated Section 26.06(2), willfully or otherwise, since he was not removing seizure notices from lands still entered under the Forest Crop Law.

The rule denying standing to assert the rights of another is only a rule of practice. *Barrows* v. *Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953). The reason for the rule is to protect the efficacy of the adversary system.

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? That is the gist of standing" *Baker* v. *Carr*, 369 U.S. 186, at p. 204, 82 S. Ct. 691, at p. 703, 7 L. Ed. (2d) 663 (1962), Brennan, J."

In *Baker* v. *Carr*, the question was one of the "substantiality" of the injury alleged; in the case at bar, the question is one of "directness." See discussion of standing by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, at p. 154, 71 S. Ct. 624, at p. 639, 95 L. Ed. 817 (1951). Nonetheless, since the validity of Mutter's conviction turns upon whether Chapter 195, L. 1959, as interpreted by the Wisconsin Supreme Court, is constitutional, Mutter clearly has the "personal stake in the outcome" required by *Baker* v. *Carr*.

Since the reason for the rule denying standing is so palpably lacking in this case, Mutter should be held to have standing to assert the constitutional rights of his employer to prevent harm to himself. Dissenting in *Communist*

Party of the U. S. v. Subversive Activities Control Board, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. (2d) 625 (1961), Mr. Justice Douglas pointed out that there is ample precedent for such practice:

> "This analysis has support in a long line of cases where the court has allowed A to assert B's constitutional right in seeking redress or prevention of harm to himself. The root of this doctrine is found in equity." 367 U.S. 1, at p. 186, 81 S. Ct. 1357, at p. 1457.

Mr. Justice Brennan, dissenting for himself and Chief Justice Warren in the same case, added that,

> ". . . a party has been allowed to assert the constitutional rights of another person not before the court as a named party in a variety of situations where the effect of the challenged state action on himself is derivative from the impact on the other person." 367 U.S. 1, at p. 193, 81 S. Ct. 1357, at p. 1461.

Surely the effect of Ch. 195, L. 1959, upon Mutter is derivative from its impact upon his employer. Mr. Justice Frankfurter, speaking for the majority in the same case, did not hold that the party could not raise the constitutional rights of its members, but only that it was premature for it to do so before the Act was in force.

The cases referred to by Mr. Justice Douglas begin with *Truax* v. *Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915), in which it was held that an alien employee threatened with loss of employment because of a State statute restricting the proportion of aliens which could be employed had standing to challenge the law, although the constitutional rights abridged were those of his employer. In *Buchanan* v. *Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917), a white seller of real property was allowed to assert the rights of a Negro purchaser in enforcing a contract to sell against a racial restrictive city ordinance.

In *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), a private and a parochial school were allowed to sue to enjoin enforcement of a state statute requiring virtually all parents to send their children to public schools on the ground that it violated the constitutional rights of parents and guardians. *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U.S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 (1944), held that a corporation could assert the due process rights of shareholders who were not Wisconsin residents in challenging a Wisconsin statute requiring the corporation to deduct a privilege tax from all dividends it paid. The corporation would remain liable to its stockholders if the tax were unlawfully withheld. It was enough for the Court that

> ". . . they are . . . adversely affected by obedience to the statute, if it is unconstitutional. We therefore conclude that appellants have standing to challenge the constitutionality of the statute." 322 U.S. 435, at p. 440, 64 S. Ct. 1060, at p. 1063.

In *Barrows* v. *Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), the defendant was sued for damages for breach of a racial restrictive covenant. *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), had previously held that equitable enforcement of such covenants was state action denying equal protection of the laws to Negroes. *Barrows* v. *Jackson* held that the defendant co-covenantor had standing to assert the constitutional rights of potential non-white purchasers of her property in order to defeat the action.

> "It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant . . . . This court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this court would deny Cali-

fornia the right to enforce in equity, *Shelley, supra;* or that this Court would deny California the right to incorporate in a statute, *Buchanan* v. *Warley,* 245 U.S. 60, 38 S. Ct. 16 . . . ." 346 U.S. 249, at p. 258, 73 S. Ct. 1031, at p. 1036.

It is submitted that the criminal conviction of Mutter is "solely for the purpose of giving vitality" to Ch. 195, L. 1959. If Ch. 195, L. 1959 is unconstitutional, Mutter's conduct was circumspect in every respect. There was no use of force here, no breach of peace. In fact, Mutter was only acting to protect property of his employer, on the land of his employer, from conversion by the State.

The reasoning of the court in *Barrows* v. *Jackson* suggests that conviction of Mutter "for the purpose of giving vitality" to an unconstitutional statute would be state action to deprive Mutter of property without due process of law. There would be no purpose in requiring Mutter to state his grievance in such a circuitous manner, simply to overcome a rule of practice, but this alternative analysis emphasizes the point that the reason for the rule denying standing does not exist here.

II. AMENDMENTS TO THE WISCONSIN STATUTES HAVE BEEN CONSTRUED TO IMPAIR THE OBLIGATIONS OF A CONTRACT EXISTING BETWEEN THE STATE AND VILAS COUNTY, WITH INJURIOUS CONSEQENCES TO APPELLANT.

a. It is immaterial in this case, whether the obligations of a contract between the county and a private party were impaired.

There is no question that timber sale agreements between Vilas County and private citizens have been nullified by the decision of the Wisconsin Supreme Court upholding the validity of the 1959 amendment to the Forest Crop

Law. But this is immaterial here, for we are concerned with the impairment of an express statutory contract between the county and the state itself.

b. None of the cases cited by Appellee, and no case heretofore decided by this Court, has ever held that a state is free to abrogate an express statutory contract it has made with one of its subdivisions.

Two types of cases have been cited by appellee in which state legislative power has been held limited by Article I, Section 10 of the United States Constitution. In one type, subsequent legislation would have abrogated rights vested in private citizens under contracts with the state's political subdivision. In the other type, the legislation would have abrogated rights vested in private citizens under contracts with the state itself. Admittedly, the instant case does not fall within either of these classes.

But neither does the instant case fall within the class of cases which Appellee claims are controlling here. *For not a single one of such cases involved the abrogation of the rights of a political subdivision under an express statutory contract between such political subdivision and the state itself.*

Hunter v. *Pittsburgh*, 207 U.S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907), as noted by Justice Frankfurter in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 Sup. Ct. 125, 5 L. Ed. (2d) 110 (1960), found that there was no contract between the state and the municipality. *Trenton* v. *New Jersey*, 262 U.S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937 (1923), merely held that a governmental power originally conferred upon a municipality by a state statute may be revoked by subsequent legislation; again, no contract between the municipality and the state was involved. *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 53 Sup. Ct. 431, 77 L. Ed.

1015 (1933), did not even involve a claim that the contract clause of the U. S. Constitution had been violated. And *Worcester* v. *Worcester Consolidated Street Railway Co.*, 196 U.S. 539, 25 Sup. Ct. 327, 49 L.Ed. 591 (1905), far from stating, as Appellee contends, that the contract clause may never be invoked by a municipality, merely said that a municipality could not object to legislative abrogation of a contract between it and a third party, where such third party had already assented to the contract's impairment.

There are three fundamental factors which distinguish the instant case from any case heretofore decided by this Court. They are:

1. The statute (sec. 77.03, Wis. Stats.) expressly stated that the provisions of the Forest Crop Law constituted the terms of a contract *between the county and the state itself*, and expressly guaranteed that such contract should remain inviolable by subsequent legislation. The Wisconsin Supreme Court has acknowledged the existence of such a statutory contract in its decision.

2. The *county's* consent was expressly required by the statute as a condition precedent to the validity of any subsequent legislation which would have the effect of varying the terms of such statutory contract, and the county gave no such consent.

3. The decision of the Wisconsin Supreme Court, that the 1947 and 1959 amendments to the Forest Crop Law validly deprived the county of previously-existing contract rights to withdraw its forest lands, has provided the sole basis upon which Appellant's actions, as a private citizen, could be held a violation of law.

As Appellant's Jurisdictional Statement and Appellee's Brief in Support of Motion to Dismiss have both pointed out, this Court has ruled that: (1) a private citizen's or

public official's rights under a statutory contract with the state or one of its political subdivisions may not be constitutionally impaired by subsequent legislation; (2) a political subdivision of a state enjoys no contract rights against the state itself under a mere grant of governmental power by statute, and the state's revocation of such grant of governmental power is therefore not prohibited by the contract clause, unless the contract rights of private citizens are thereby impaired; and (3) a political subdivision cannot be heard to complain that subsequent legislation has impaired its rights under a contract with a third person (not the state), although the rights of such third person under such a contract are constitutionally protected.

Two basic principles are inherent in these rules. The first is that a state, though it may constitutionally revoke privileges or governmental powers granted by statute, may not use its legislative power to revoke *contract* rights granted by statute. The second is that the United States Constitution protects private citizens against injury resulting from legislation impairing contract obligations. We submit that these principles are applicable to the instant case; for the state, as the Wisconsin Supreme Court has found, entered into an express statutory contract with the county, and then attempted by subsequent legislation unilaterally to abrogate or alter the terms of such contract. And the determination that this legislation was valid is the sole support for Appellant's conviction.

Whether a state may thus abrogate its own contract with one of its political subdivisions to the consequent injury of one of its citizens (even though the rights of such citizen which are affected are not contract rights) is the question presented on this appeal. It is a question never before presented to or decided by this Court; the precise question has only been bracketed by earlier decisions in the area,

as Appellee's own Brief indicates. It is important for this Court to decide whether such state action is permissible or falls within the area of constitutional prohibition.

While, as noted in our Jurisdictional Statement, we have found no case which has ever decided the precise issue presented by this appeal, we have found one decision which holds squarely for the principle that a municipality's rights under a contract with the state itself are constitutionally protected. *Grogan* v. *San Francisco*, 18 Cal. 590 (1861). So far as we have been able to determine this is the only reported case, other than the case at bar, in which a court of this land has first found that a statute constituted a contract between a state and a municipality, and then went on to decide whether such contract was inviolable against subsequent legislation. After finding that a state legislative grant to San Francisco was an executed contract within the contract clause, the California court considered the effect of the state's sovereign power as follows (18 Cal. 613):

> "And though a municipal corporation is the creature of the Legislature, yet when the State enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the Legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts."

We submit that the reasoning of the California court is impeccable; that it is firmly grounded upon the principles evolved in the decisions of this Court; and that it should be given controlling effect in the case at bar.

CONCLUSION.

Because this appeal presents a question of public importance respecting the constitutional limits of state legislative power, where the exercise of such power has abrogated the state's own contract obligations with injurious consequences to one of its citizens, and because this question has never been decided by this Court, we submit that jurisdiction should be noted.

Respectfully submitted,

ROGER C. MINAHAN
EDWARD D. CLEVELAND
Attorneys for Anthony Mutter, Appellant.

WHYTE, HIRSCHBOECK, MINAHAN,
HARDING & HARLAND
Of Counsel.

October 23, 1964.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 30 1964
JOHN F. DAVIS, CLERK

No. 495

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONSE OF APPELLEE TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

Post Office Address:

Room 114 East
State Capitol
Madison, Wisconsin

No. 495

In The

Supreme Court of the United States

October Term, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONSE OF APPELLEE TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

This response is filed pursuant to oral permission of the Office of the Clerk of this honorable court. On page 3 of his Brief in Opposition to Motion to Dismiss, Appellant states:

> "• • • If equity were to control, it could easily be demonstrated that the counties of Wisconsin, including Vilas County, have yielded up to the state under the Forest Crop Law, in forest mill taxes and severance taxes, far more than they have ever received in state aids."

This is not a matter of record in this case and could not be. The facts are as shown by the records of the State Conservation Commission of Wisconsin that up to the date

of October, 1963, when the previously existing program was terminated by the adoption of the new County Forest Law, Chapter 345, Laws of 1963, which increased county aids and sought to devote the county forests permanently to public use, Vilas County had received a total of $88,752.45 and had repaid the state through severance taxes and allotments $40,011.52, leaving a total indebtedness to the state of $48,740.93.

Further, that in the year 1959 the last time a complete study was made on the subject, for each $1.00 that property owners of Vilas County had contributed to the state under the forestry mill tax, Vilas County had received a total of $5.33 from all state forestry services and aids.

Respectfully submitted,

GEORGE THOMPSON
Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General of Wisconsin

Attorneys for the State of Wisconsin

Dated this 28th day of October, 1964.